Military Commissions Trial Judiciary
Guantanamo Bay, Cuba

UNITED STATES OF AMERICA
v.
KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL-HAWSAWI

Response/Opposition by 14 News Organizations to Government's Motion to Protect Against Disclosure of National Security Information (AE013) and Cross-Motion to Enforce Public Access Rights

May 16, 2012

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1. **Timeliness.** This Opposition is timely filed in response to the Government's for a protective order motion (AE013) under the Rules of Court ("RC").

2. **Relief Sought.** Pursuant to Rules of Court 3(5)(c) and Regulations 17-1 and 19-3(c) & (d) of the 2011 Regulation for Trial by Military Commissions, The Miami Herald, ABC, Inc., Associated Press, Bloomberg News, CBS Broadcasting, Inc., Fox News Network, The McClatchy Company, National Public Radio, The New York Times, The New Yorker, Reuters, Tribune Company, Wall Street Journal, and Washington Post (collectively the "Press Objectors") respectfully oppose as overly broad the Government's motion for a protective order (AE013) ("Gov't Mot."). The Commission should deny the Government's request to deny public access to all records and proceedings that involve any classified information.

No proceeding or record in this case may be closed to the public unless the Government first makes an evidentiary showing sufficient to overcome the public's First Amendment right of access. Specifically, the Government must demonstrate that (1) the disclosure of specific information would create a substantial likelihood of harm to a compelling governmental interest, (2) no alternative other than closure can avoid that harm, (3) closure will be effective in

preventing the threatened harm, and (4) the closure requested is narrowly tailored in scope and time. The Government's blanket request for permission to close all testimony by defendants and all statements made in open court concerning their treatment on the ground that this information is classified does not satisfy this constitutional test.

3. **Overview.** In seeking a protective order to seal records and close proceedings, the Government reasons that because the defendants in this case were detained and interrogated in a classified CIA information-gathering program, any statements made *by the defendants* are all "presumptively classified until a classification review can be completed." Gov't Mot. at 6, ¶ 5g. The Government then argues that because the Military Commissions Act, 10 U.S.C. § 948a, *et seq.* (M.C.A.), permits some proceedings involving classified information to be closed to the press and public, the Commission should take a number of steps that would automatically close the trial during any statement by a defendant and during any comments by others about defendants' treatment and conditions of confinement until they can be subjected to government review and permission. The Government's request is fundamentally flawed in multiple respects.

a. Even if statements made by defendants or about their treatment can properly be deemed "classified" under the Executive Order (a questionable premise),[1] both the M.C.A. and the First Amendment require the Commission to demonstrate a specific threat to nationals security before a Commission proceeding may be closed. The M.C.A. allows commission proceedings to be closed only where a specific finding is made that closure is necessary to prevent reasonably expected damage to the national security or to ensure the physical safety of

[1] As noted in the pending ACLU Motion for Public Proceedings (AE013A) ("ACLU Mot."), the authority to classify information by Executive Order 13,526 §1.1(a)(2) is restricted to information "by . . . or is under the control of the United States Government," and this authority cannot be used to restrict disclosure of information simply because it is embarrassing or to conceal illegal conduct. (ACLU Mot. at 19-21.)

individuals. M.C.A. § 949d(c)(2). The First Amendment allows commission proceedings to be closed only upon a specific finding of a "substantial probability" of harm to national security or some equally compelling governmental interest. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10 (1986) ("*Press- Enterprise II*"). Because the First Amendment independently mandates open commission proceedings, the Government must satisfy its higher standard before closure is allowed.[2] The Government's motion fails to do so. Testimony provided in open court may not be withheld—even for a few weeks—simply because the Government has classified it. *In re Washington Post*, 807 F.2d 383, 391-92 (4th Cir. 1986).

b. The blanket order requested by the Government that would automatically close proceedings during any testimony by a defendant and during all discussions about his treatment is procedurally improper. The United States Supreme Court has made clear that proceedings subject to the First Amendment access right may only be closed on a case by case basis. An independent judge must determine on a specific set of facts whether a need for secrecy actually has been demonstrated that is sufficient to overcome the public's constitutional access right. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

c. The extensive public record concerning the interrogation and treatment of the defendants in this case, including information from the Government itself, undermines the Government's blanket claim that the national security would be threatened by their own testimony. Barring contemporaneous public access to testimony about information already known to the public is not proper, under either the M.C.A. or the First Amendment. Transparency is essential for public acceptance of the verdict and public accountability of the

[2] To the extent the M.C.A. allows closure under any standard less rigorous than "substantial probability" of prejudice to national security, its authorization is inconsistent with the First Amendment, and the heightened constitutional standard must prevail. *Press Enterprise II*, 478 U.S. at 14 (rejecting "reasonable likelihood" standard as insufficiently protective of public access right).

government, and it may not lightly be restricted. *Press Enterprise II*, 478 U.S. at 14 (any closure permitted must "prevent" the threatened harm).

4. **Burden of Proof.** Because these proceedings are subject to both a statutory and constitutional right of public access, the Government bears the burden of establishing a proper factual basis for sealing any records and closing any proceedings, in whole or in part. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. II,* 478 U.S. at 15; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123-24 (2d Cir. 2006); *ABC, Inc. v. Stewart*, 360 F.3d 90, 106 (2d Cir. 2004); *Washington Post v. Robinson*, 935 F.2d 282, 288 (D.C. Cir. 1991).

5. **Statement of Facts.** Defendants in this capital case stand accused of planning, orchestrating and committing the most deadly acts of international terrorism in this Nation's history: the September 11, 2001 attacks, using hijacked commercial airliners, on the World Trade Center, the Pentagon, and aborted United Airlines Flight 93 that crashed in Shanksville, Pennsylvania.

The defendants have been in U.S. custody since 2002 and 2003. During this time, by the Government's own admission, they have been subjected to "enhanced interrogation techniques" in a CIA program designed for "high-value detainees" ("HVDs"). The treatment of the defendants while in U.S. custody continues to be the focus of significant public controversy and concern. As evidenced at their arraignment on May 5, 2012, the defendants apparently intend to make their treatment a centerpiece of their defense.

The Government asserts that any statements by the defendants about their own treatment is classified and must be kept from the public: "Because the Accused were detained and interrogated in the CIA program, they *were exposed to classified sources, methods and*

activities" so that "*any and all statements by the Accused are presumptively classified* until a classification review can be completed." Gov't Mot. at 6 ¶ 5g (emphasis added). The Government concedes that information about the defendants' treatment is already publicly available, including officially acknowledged descriptions of the various "enhanced interrogation techniques" that were approved for use by the CIA. *Id.* ¶ 5i. These techniques are not secret. Nevertheless, the Government asserts that

> Other information related to the program has not been declassified or officially acknowledged, and therefore remains classified. This classified information includes allegations involving (i) the location of its detention facilities, (ii) the identity of any cooperating foreign governments, (iii) the identity of personnel involved in the capture, detention, transfer, or interrogation of detainees, (iv) interrogation techniques as applied to specific detainees, and (v) conditions of confinement [REDACTED] The disclosure of this classified information would be detrimental to national security. [REDACTED]

Id. ¶ 5j. The Government also asserts that disclosure of classified information relating to DOD sources, methods and activities at JTF-GTMO would be detrimental to national security. *Id.* ¶ 5k.

6. Discussion. The Commission should deny the Government's over-reaching request for automatic closure of proceedings by means of a white noise generator to prohibit public access to the courtroom proceedings anytime a defendant testifies or counsel discuss anything relating to the treatment of a defendant in U.S. custody. The heart of the Government's motion is its claim that any and all testimony by defendants in this capital case, *describing their own first-hand experience* while in U.S. custody, is presumptively "classified" and should therefore be withheld from the public for declassification review in all cases. Gov't Mot. (AE013) at 18 ("the Accused's statements are presumed classified until a classification review is

completed.").[3] But even if the Government's effort to declare all such information "presumptively classified" is permissible, the classification *ab initio* of testimony given in open court constitutes an insufficient basis for automatically overriding the public's constitutional rights, as the Government requests. Rather, the Government is required to identify to the Commission the specific secret facts whose disclosure would truly threaten national security, and if the Commission finds that disclosure would indeed create a substantial probability of harm, then *only* those facts may be subject to initial exclusion of the public, through the use of the 40-second delay or otherwise.

I.

SIMPLY DESIGNATING TESTIMONY BY DEFENDANTS AS "CLASSIFIED" DOES NOT, BY ITSELF, PROVIDE A SUFFICIENT BASIS FOR CLOSING COMMISSION PROCEEDINGS

A. The Press and Public Have An Affirmative Right of Access to Commission Proceedings

Both the Military Commissions Act ("MCA") and the Constitution of the United States recognize a qualified right of public access to the proceedings and records of the military commissions at Guantanamo.

1. Statutory Based Right of Public Access

In first adopting the Military Commissions Act in 2006, Congress recognized the critical importance that these proceedings be conducted in the open so the watching world would accept their validity. *See, e.g.*, 152 CONG. REC. H7522, H7534 (Sept. 27, 2006) (statement of Rep.

[3] While the Press Objectors do not necessarily accept as proper all of the Government's classification decisions, and are not privy to the Government's sealed filings in support of its motion, they are *not* asking the Commission to conduct a review (*de novo* or otherwise) of the classification decisions made by DOD or CIA officials. *See* R.M.C. 806, Discussion. Rather, the Press Objectors call upon the Commission to fulfill its constitutional duty to independently determine whether disclosure of information these agencies have deemed "classified" in open court during this criminal prosecution would create a substantial probability of harm to national security.

Hunter); 152 CONG. REC. H7508, H7509 (Sept. 27, 2006) (statement of Rep. Cole); 152 CONG. REC. H7522, H7552 (Sept. 27, 2006) (statement of Rep. Hunter); 152 CONG. REC. H7925, H7937 (Sept. 29, 2006) (statement of Rep. Sensenbrenner); 152 CONG. REC. H7925, H7945 (Sept. 29, 2006) (statement of Rep. Sensenbrenner). Congress thus expressly mandated, in 2006 *and again in 2009*, that the commission proceedings must be open to the press and public, except in certain narrowly limited circumstances. *See* 10 U.S.C. § 949d(c)(2).

Consistent with this statutory mandate, the Department of Defense Regulation for Trial by Military Commission ("Regulation" or "Reg."), the Manual for Military Commissions ("Manual" or "R.M.C."), and the Military Commissions Trial Judiciary Rules of Court ("R.C.") all make plain that the proceedings are to be open to "representatives of the press, representatives of national and international organizations, . . . and certain members of both the military and civilian communities." R.M.C. 806(a.) The "proceedings" open for public inspection include motion papers, rulings, and conference summaries that form the record. Under the Regulation, the right of access applies "from the swearing of charges until the completion of trial and appellate proceedings or any final disposition of the case." Reg. 19-2.

Under the M.C.A., proceedings of the Commission may only be closed to the public where a military judge makes a "specific finding" that closure is "necessary" to protect information "which could reasonably be expected to cause damage to national security" or to "ensure physical safety of individuals." *See* M.C.A. §949(c)(2). DOD cannot impose by regulation restrictions on access that are inconsistent with this statutory mandate. *See* 10 U.S.C. 949a(a) ("Pretrial, trial, and post-trial procedures" before military commissions, to be prescribed by Secretary of Defense, "may not be contrary to or inconsistent with this chapter.") Recognizing this fact, Reg. 19-6 states that "[t]he military judge may close proceedings of military

commissions to the public *only* upon making the findings required by M.C.A. § 949d(c) and R.M.C. 806." (Emphasis added.) *See also* Reg. 18-3 (requiring express finding, which "shall be appended to the record of trial.").

2. Constitutional Right of Access

The First Amendment independently "protects the public and the press from abridgement of their rights of access to information about the operation of their government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); *Press-Enterprise Co. I*, 464 U.S. at 508 (Blackmun, J. and Stevens, J., concurring) (recognizing First Amendment right of public access to *voir dire* proceedings). The scope of this qualified constitutional right was first defined by the U.S. Supreme Court in *Richmond Newspapers*, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings that trumped the state statute.

The Court found this right to be implicit in the First Amendment's guarantees of free speech and press, just as the right of association, right of privacy, right to travel the right to be presumed innocent and other rights are implicit in various provisions of the Bill of Rights.[4] As the Court later put it in *Globe Newspaper Co. v. Superior Court*, 457 U.S. at 604, the First Amendment right of access is based upon,

[4] *See Id.* at 577 (Burger, J.) (the right of access is "assured by the amalgam of the First Amendment guarantees of speech and press" and their "affinity to the right of assembly"); *Id.* at 585 (Brennan, J., concurring) ("the First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access).

> the common understanding that a "major purpose of that Amendment was to protect the free discussion of government affairs." By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government. (Citation omitted.)

Richmond Newspapers "unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment." 448 U.S. 583 (Stevens, J. concurring).[5]

Under the "history and policy" analysis adopted by the Supreme Court, the constitutional right of access exists where government proceedings traditionally have been open to the public, and public access plays a "significant positive role" in the functioning of the proceeding. *E.g., Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9. While this right has most frequently been asserted to compel access to judicial proceedings,[6] the right equally applies to proceedings conducted in the executive branch. *E.g., New York Civil Liberties Union v. New York City Transit Auth.*, 652 F.3d 247 (2d Cir. 2011) (administrative adjudication); *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 695-96 (6th Cir. 2002) (deportation hearings); *Whiteland Woods, L.P. v. West Whiteland*, 193 F.3d 177, 181 (3d Cir. 1999) (planning meeting).

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[5] Like any member of the public, the press has standing to be heard in opposition to the denial of public access. *See, e.g., Globe Newspaper Co.*, 457 U.S. at 609 n.25 ("representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion'") (citation omitted); *ABC, Inc. v. Powell*, 47 M.J. 363, 365 (C.A.A.F. 1997) (press has standing to complain if access is denied); *Denver Post Corp. v. United States*, Army Misc. 20041215, at *2 (A. Ct. Crim. App. Feb. 23, 2005) (noting "obvious" error in closing proceedings before allowing newspaper's counsel to address the issue).

[6] The constitutional right also attaches to government records in certain contexts. *See, e.g., Washington Post v. Robinson*, 935 F.2d at 287-88 (First Amendment access right attaches to plea agreement); *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502-04 (1st Cir. 1989) (same for sealed criminal court files); *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569, 573 (8th Cir. 1988) (same for search warrant affidavits); *In re New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (same for pre-trial suppression motion); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (same for all pretrial court filings).

Applying the same history and policy analysis, the First Amendment right of access plainly applies to these proceedings:

Historical Experience. William Winthrop, known as the "Blackstone of Military Law" (*Reid v. Covert,* 354 U.S. 1, 19, n. 38 (1957) (plurality opinion)), described in his classic opus on military law a history of open military tribunals that dates back centuries:

> Originally, (under the Carlovingian Kings,) courts-martial . . . were held *in the open air*, and in the Code of Gustavus Adolphus. . . . criminal cases before such courts were required to be tried "*under the blue skies.*" The modern practice has inherited a similar publicity.

WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 161-62 (rev. 2d ed. 1920). The same tradition of public access to courts-martial also runs through the history of military commissions. After all, commissions historically have "differed from the court-martial only in terms of jurisdiction." David W. Glazier, Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2092 (2003). As the Supreme Court has explained:

> [T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. . . . The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. *See* Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial.

Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2788, 2792 (2006).[7]

[7] The United States Court of Military Commission Review has also recognized that Congress intended the practices of military commissions to "mirror" those of courts-martial. *United States v. Khadr*, CMCR 07-001 at 23 & n.35 (Sept. 24, 2007) (citing and quoting M.C.A. §§ 949a(a) & 948b(c)).

With rare exception,[8] military commissions have been conducted publicly throughout our nation's history:

- During the Civil War, for example, members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order "to avoid the inconvenience of dismissing *the audience assembled to listen to the proceedings*." WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 289 (rev. 2d ed. 1920) (emphasis added and internal quotation marks omitted).

- The military commission established to try John Wilkes Booth's co-conspirators in Lincoln's assassination was opened to the public after reporters complained and Gen. Ulysses S. Grant "led them to the White House to talk to the president." *See* James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, WASH. POST, F1 (Dec. 9, 2001).[9]

- The military commission that tried General Tomoyuki Yamashita in 1945 was also open to the press and public. *See* Ass'n of Bar of City of NY, *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 790 (2005).

The weight of experience across centuries supports the recognition of a public right of access to prosecutions in military courts.

Policies Advanced by Public Access. Justice Brennan wrote separately in *Richmond Newspapers* to underscore the crucial structural role of public access in criminal cases, describing open trials as "bulwarks of our free and democratic government." *Richmond Newspapers*, 448 U.S. at 592 (Brennan, J., concurring). The Supreme Court in that case

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[8] A 1942 trial of Nazi saboteurs was conducted in secret, but that precedent underscores how secrecy is counterproductive in the long run. It is now widely believed that the "real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI's bungling of the case secret." *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, HEARINGS BEFORE THE SENATE COMM. ON THE JUDICIARY, 107th Cong. 377 (Nov. 28, 2001) (statement of N. Katyal, Visiting Professor, Yale Law School, and Professor, Georgetown University), *available at* http://www.judiciary.senate.gov/hearings/testimony.cfm?id=4f1e0899533f7680e78d03281fdabd2c&wit_id=4f1e0899533f7680e78d03281fdabd2c-0-0 (last visited May 13, 2012).

[9] The openness of these Civil War era commissions is particularly significant in light of the rampant suppression of the freedom of the press and "gross violations of the First Amendment" that otherwise occurred during the Civil War era. *See* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (1998).

identified at least five distinct interests that are advanced by open proceedings, each of which applies to prosecutions by military commissions as well: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial's results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted. *See Id.,* 448 U.S. at 569-71.

Judges within the military justice system have long recognized that openness significantly assists the functioning of military tribunals in this very same fashion. Even before the Supreme Court first articulated the constitutional access right in *Richmond Newspapers*, the Court of Military Appeals had identified the functional benefits of public proceedings to include: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. *See United States v. Brown*, 22 C.M.R. 41, 45-48 (C.M.A. 1956). Just as in civilian courts, public access to military tribunals improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for educating the public. *See* Ass'n of Bar of City of NY, "*If it Walks, Talks and Squawks . . .*" *The First Amendment Right of Access to Administrative Adjudications: A Position Paper*, 23 CARDOZO ARTS & ENTERT. L.J. 21, 25 (2005).

For all the reasons cited in *Brown*, a long chain of precedent since *Richmond Newspapers* recognizes that the public's constitutional right of access extends to military tribunals. *See, e.g.*, *United States v. Anderson*, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) (per curiam) (absent justification clearly set forth on the record, "trials in the United States military justice system are to be open to the public"); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (First

Amendment right of public access extends to courts-martial); *United States v. Hershey*, 20 M.J. 433, 436, 438 n.6 (C.M.A. 1985) (finding First Amendment right of public access to a court-martial proceeding); *United States v. Scott*, 48 M.J. at 665 (same); *United States v. Story*, 35 M.J. 677, 677 (A. Ct. Crim. App. 1992) (per curiam) (same); *ABC, Inc. v Powell*, 47 M.J. 363 (C.A.A.F. 1997) (First Amendment right of access applies to investigations under Article 32).

As explained by Wigmore in his seminal treatise quoted in *Brown* "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." Wigmore, *Evidence* (3d ed.) § 1834, *quoted in Brown*, 22 C.M.R. at 45; *see also United States v. Hood*, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996). Openness is particularly important here, given the world-wide attention being paid to these proceedings:

> Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring). *See also United States v. Clark*, 475 F.2d 240, 247 (2d Cir. 1973) ("Secret hearings – though they be scrupulously fair in reality – are suspect by nature."); *United States v. Scott*, 48 M.J. 663, 665 (A. Ct. Crim. App. 1998) (public confidence can "quickly erode" when proceedings are closed); *United States v. Anderson*, 46 M.J. 728, 731 (Army Ct. Crim. App. 1997) (same). As one commentator has cautioned: "Conducting military commission trials today that fall short of both their historic purposes and contemporary standards of justice is likely to stain the reputation of both the American military and the American justice system as a whole." David W. Glazier,

Notes, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2093 (2003).

B. To Overcome The Public's Access Rights, The Government Must Demonstrate A Substantial Probability Of Risk To National Security

While the constitutional access right is a qualified right, not an absolute right, a proceeding subject to the First Amendment right may be closed *only* if the party seeking to seal can satisfy a rigorous four-part test. Different verbal formulations have been used by various courts to define the showing that must be made, but the governing standard applied by the Supreme Court encompasses four distinct factors:

1. **There must be a substantial probability of prejudice to a compelling interest.** Anyone seeking to restrict the access right must demonstrate a substantial probability that openness will cause harm to a compelling governmental interest. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 582; *Press-Enterprise I*, 464 U.S. at 510; *Press-Enterprise Co. II*, 478 U.S. at 13-14. In *Press-Enterprise I*, the Supreme Court stressed that a denial of access is permissible only when "essential to preserve higher values." 464 U.S. at 510. In *Press-Enterprise II* it specifically held that a "reasonable likelihood" standard is not sufficiently protective of the access right, and directed that a "substantial probability" standard must be applied. 478 U.S. at 14-15.

2. **There must be no alternative to adequately protect the threatened interest.** Anyone seeking to defeat access must further demonstrate that there is nothing short of a limitation on the constitutional access right that can adequately protect the threatened interest. *Press-Enterprise II*, 478 U.S. at 13-14. A "trial judge must consider alternatives and reach a reasoned conclusion that closure is a preferable course to follow to safeguard the interests at issue." *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984).

3. **Any restriction on access that is imposed must be effective.** Any order limiting access must be effective in protecting the threatened interest for which the limitation is imposed. As articulated in *Press-Enterprise II*, 478 U.S. at 14, the party seeking secrecy must demonstrate "that closure would prevent" the harm sought to be avoided. *See In re The Herald Co.*, 734 F.2d at 101 (closure order cannot stand if "the information sought to be kept confidential has already been given sufficient public exposure"); *Associated Press v. U.S. District Court*, 705 F.2d 1143, 1146 (9th Cir. 1983) (must be "'a substantial probability that closure will be effective in protecting against the perceived harm'" (citation omitted)).

4. **Any restriction on access must be narrowly tailored.** The Supreme Court has long recognized that even "legitimate and substantial" governmental interests "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker,* 364 U.S. 479, 488 (1960). Any limitation imposed on public access thus must be no broader than necessary to protect the threatened interest. *See, e.g., Press-Enterprise II,* 478 U.S. at 13-14; *Lugosch,* 435 F.3d at 124; *In re New York Times Co. (Biaggi),* 828 F.2d at 116.

The adjudicatory tribunals of the military branches have applied these same standards to their proceedings. As explained in *Hershey*, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." 20 M.J. at 436; *see also Anderson*, 46 M.J. at 729 ("[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial."). The Army Court of Military Appeals has also applied this standard as the substantive prerequisite for a court to enter a "protective order" limiting public access to documents admitted into evidence in a court martial proceeding. *See Scott*, 48 M.J. at 665.

C. The Fact That Classified Information May Be Discussed is Not, By Itself, An Adequate Grounds for Closing A Commission Proceeding

The Government urges the Commission to close proceedings in this prosecution by interposing the white noise signal to the viewing gallery any time a defendant testifies or the treatment of a defendant is discussed by counsel. The Government considers all such information "classified," even the first-hand accounts defendants may give during the course of their defense. Gov't Mot. at 8-11.

The Government cannot by mere invocation of "national security" concerns purportedly arising automatically from any "classified" information justify the closing of a criminal trial. As Justice Black warned in the Pentagon Papers case:

> The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic.

United States v. New York Times Co., 403 U.S. 713, 719 (1971) (Black, J., concurring). As the Fourth Circuit has aptly noted, "the mere assertion of national security concerns by the Government is not sufficient reason to close a hearing or deny access to documents. . . . Rather, [courts] must independently determine whether, and to what extent, the proceedings and documents must be kept under seal." *United States v. Moussaoui*, 65 F. App'x 881, 887 (4th Cir. 2003) (unpublished) (internal citation omitted).

Consistent with their obligation to uphold public access rights, courts previously have rejected the argument that the heightened First Amendment closure requirements are satisfied automatically whenever classified information is involved:

> [T]roubled as we are by the risk that disclosure of classified information could endanger the lives of both Americans and their foreign informants, we are equally troubled by the notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present. History teaches us how easily the spectre of a threat to "national security" may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to possible abuse.

In re Washington Post, 807 F.2d 383, 391-92 (4th Cir. 1986).[10]

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[10] The Government argues in response to the ACLU Motion that there is no First Amendment right either "to reveal" or "to receive" classified information. Gov't Response at 12 (AE013D). It's argument misperceives the nature of the First Amendment access right—it is a right of the public to observe *this proceeding*, a right that can only be overcome where this tribunal finds a substantial probability ot harm to the national security. The fact that information is deemed classified by the Government is not sufficient, by itself to close a trial.

As the Government acknowledges, the M.C.A.'s provisions governing the handling of classified information in these proceedings are derived from, and premised upon, the Classified Information Procedures Act ("CIPA"). *See* Gov't Mot. at 8. The CIPA statute does not trump presumption of access to a public trial. "Even disputes about claims of national security are litigated in the open." *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) (citing *New York Times Co. v. United States*, 403 U.S. 713 (1971)); *see also United States v. Progressive, Inc.*, 467 F. Supp. 990 (W.D. Wis. 1979).

Notably, all courts to address the issue have uniformly held that CIPA neither purports to – nor could it – override the requirements of the First Amendment with respect to public access to the trial itself. *See, e.g.*, *In re Washington Post Co.*, 807 F.2d at 393 (even if CIPA "purported to resolve the issues raised here, the district court would not be excused from making the appropriate constitutional inquiry"); *Moussaoui*, 65 F. App'x at 887 (although press did not seek access to classified information, court noted "CIPA alone cannot justify the sealing of oral argument and pleadings"); *United States v. Poindexter*, 732 F. Supp. 165, 167 n.9 (D.D.C. 1990) ("CIPA obviously cannot override a constitutional right of access"); *United States v. Pelton*, 696 F. Supp. 156, 159 (D. Md. 1986) (holding that CIPA statute does not provide for the closure of a criminal trial and First Amendment standards must be satisfied prior to closure of criminal trial).[11] CIPA does not relieve the Government of its heavy constitutional burden to overcome the public's access right.

[11] *See also United States v. Rosen*, 487 F. Supp. 2d 703, 710 (E.D. Va. 2007) ("Closing a trial, even partially, is a highly unusual result disfavored by the law. A statute, even one regulating the use of classified information, should not be construed as authorizing a trial closure. . . . Rather, because a trial closure implicates important constitutional rights, CIPA should not be read to authorize closure absent a clear and explicit statement by Congress in the statutory language.")

Notwithstanding CIPA, this Commission is required to make an independent assessment of whether the Government has met its burden, and may not blindly accept the blanket insistence of secrecy for all purportedly classified information. Merely because information is classified does not automatically mean that either a "likelihood" or a "substantial probability" exists that its disclosure in a criminal prosecution will harm our national security.[12]

Moreover, it is not enough for the Government to argue that use of the 40-second delay switch to temporarily close a proceeding excludes the public only so long as needed for a subsequent classification review. The First Amendment right of access to judicial proceedings is a right of *contemporaneous* and *timely* access to information. *See, e.g.*, *Lugosch*, 435 F.3d at 126-27 (emphasizing "the importance of immediate access where a right to access is found"); *Hirschkop v. Snead*, 594 F.2d 356, 373 (4th Cir. 1979) ("the first amendment protects not only the content of speech but also its timeliness"). As the Supreme Court observed in *Nebraska Press Association v. Stuart*, "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly." 427 U.S. at 560-61. Put simply, "'each passing day may constitute a separate and cognizable infringement of the First Amendment.'" *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers) (quoting *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1319, 1329 (1975) (Blackmun, J., in chambers)); *Lugosch*, 435 F.3d at 126-27 ("'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury'") (citation omitted).

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[12] *See Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing*: Hearing Before the Subcomm. on National Security, Emerging Threats, and International Relations of the Comm. on Government Reform, 108th Cong. 263 at 82-83 (2004) (statement of J. William Leonard, Director, Information Security Oversight Office, National Archives and Records Administration) (estimating that more than 50 percent of all classified government information has been improperly designated as such); *see also* Pub. L. 111-258, § 2, 124 Stat. 2648 (Oct. 7, 2010) codified at 6 U.S.C. § 124m & 50 U.S.C. § 135d (the Reducing Over-Classification Act) (congressional finding that "the over- classification of information . . . needlessly limits stakeholder and public access to information.").

To satisfy its constitutional burdens, before excluding the public the Government must make a factual showing that each step of the four-part test is satisfied for specific items of information that threaten the national security. Only those items may be withheld, even temporarily.

II.

A *PER SE* RULE CLOSING ALL STATEMENTS ABOUT THE TREATMENT OF DEFENDANTS WOULD VIOLATE THE PUBLIC'S CONSTITUTIONAL ACCESS RIGHT

The Government improperly asks the Commission for a blanket order that would effectively close the proceedings any time there is testimony or discussion concerning the conditions of confinement and/or interrogations of a defendant while in U.S. custody. See Gov. Proposed Protective Order ¶ 43 ("the broadcast may be suspended whenever it is reasonably believed that any person in the courtroom has made or is about to make a statement or offer testimony disclosing classified information."); Gov't Mot. at 18 ("the Accused's statements are presumed classified"). Under settled precedent, such a *per se* presumption of harm flowing inevitably from any testimony by a defendant in all circumstances is not a proper basis for denying access rights.

In *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982), the Supreme Court struck down a Massachusetts statute that imposed such a *per se* exclusion of the public from criminal trials of certain sexual offenses during the testimony of any minor victim. *Id.* at 610-11. Even though the interest of protecting minor sex crime victims from additional trauma is undoubtedly a compelling one, the Supreme Court held that the statute did not allow for the constitutionally required case-by-case review and findings necessary to justify closure. *Id.* at 607-08. As *Globe Newspaper* makes clear, *per se* rules that restrict First Amendment rights, by definition, are not sufficiently "narrowly tailored" to pass constitutional muster. *See also*

Florida Star v. B.J.F., 491 U.S. 524, 539-40 (1989) ("We have previously noted the impermissibility of categorical prohibitions upon media access where important First Amendment interests are at stake.") (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 608 (1982)). The Commission should therefore reject the Government's request for a per se presumption of harm arising from any and all testimony concerning the defendants' confinement, treatment and interrogation while in U.S. custody. The First Amendment requires a case-by-case determination and particularized findings that closure is necessary, *in a particular set of circumstances*, to protect a governmental interest of the highest order.

III.

THE GOVERNMENT HAS NOT ESTABLISHED ANY PROPER BASIS FOR CLOSING THESE PROCEEDINGS

The requested closure order is overbroad for the further reason that a great deal is already known about the nature of the interrogation of these defendants and the conditions of their confinement. The Government cannot credibly establish a risk to national security from testimony about information that is already widely known and available on the Internet.

The circumstances of these defendants' treatment while in custody has been the subject of significant attention worldwide and raises issues of profound public interest. While the Government's motion suggests that only "a limited amount of information relating to the CIA program" of detaining and interrogating "high-value detainees" is publicly known, Gov't Mot. at 6, in fact, rather detailed information concerning the treatment and interrogations of defendants has already been the subject of reports and memoranda publicly released by the United States Government. Among the disclosures:

- A publicly-released U.S government memorandum describes the interrogation techniques the CIA was authorized to use and provides great detail about the

treatment of particular detainees, including that defendant Mohammad was waterboarded 183 times in March 2003.[13]

- A CIA Inspector General's report describes several instances of coercive techniques used by the CIA that exceeded authority provided to the CIA, providing details of actual techniques used, with such examples as the threat to defendant Mohammad that "if anything else happens in the United States, 'We're going to kill your children.'"[14] Id. ¶ 95.

- An FBI report discloses several incidents of prolonged shackling or stress positions, including that from other agents or from detainees. For example, one FBI agent told the OIG that defendant Abdel Aziz complained that he had been subjected to yelling, short-shackling, lowered room temperature, strobe lights, and music, and that he was left in the interrogation room for over 12 hours with no food, bathroom breaks, or breaks to pray.[15]

See ACLU Mot. at 24-28 (summarizing facts disclosed in several declassified memoranda and other official U.S. Government records public disclosed); *see also Background Paper on CIA's Combined Use of Interrogation Techniques*, *available at* http://bit.ly/3YJp0.

Many reports of international organizations and press accounts have provided additional information about the interrogation of detainees and their treatment while in custody.[16] The

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[13] Memorandum from Steven G. Bradbury to John A. Rizzo, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques That May Be Used in the Interrogation of a High Value al Qaeda Detainee (May 10, 2005), at 8, available at http://bit.ly/Iltguh.

[14] CIA Office of the Inspector General, Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003) (May 7, 2004), ¶ 95, available at http://wapo.st/3JNHM ("IG Report"). [declassified August 24, 2009]

[15] Justice Department Office of the Inspector General Review of the FBI's Involvement in and Observations of Detainee Interrogations in Guantanamo Bay, Afghanistan and Iraq, (May 20, 2008) (Part 5, p. 182, *available at* http://www.aclu.org/files/pdfs/safefree/OIG_052008_158_207.pdf)

[16] *See, e.g.,* International Committee for the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody* (Feb. 2007) (ICRC Report), *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf. (based on interviews with 14 detainees, including the five defendants, detailing interrogations techniques used on defendants and conditions of confinement); Joby Warrick, Peter Finn & Julie Tate, *Red Cross Described 'Torture' at CIA Jails*, WASHINGTON POST (Mar. 16, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/03/15/AR2009031502724.html (summarizing ICRC Report, reporting that "the captives were routinely beaten, doused with cold water and slammed head-first into walls. . . . they were stripped of clothing, bombarded with loud music, exposed to cold temperatures, and deprived of sleep and solid food for days on end. Some detainees described being forced to stand for days, with their arms

Government suggests that such public reports are not significant to the continued status of the information as "classified" if facts have not been confirmed U.S. officials, but the fact that these reports are known and available on the Internet has an obvious significance to the issue of whether testimony by defendants concerning this same information has any substantial probability of damaging our national security.

The Government identifies five categories of information about these defendants, the release of which it contends could damage national security, but fails to make a convincing showing on the publicly known facts:

(i) Location of detention facilities. As documented in the ACLU motion for public proceedings (AE013A), the public results of investigations by the United Nations and European officials identify six nations as places where these defendants were held while in U.S. custody. (ACLU Mot. at 29-30.) The identified locations include the Polish village of Stare Kiejkut, Bucharest, Romania, Afghanistan, Thailand, Lithuania and Morocco.[17]

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shackled above them, wearing only diapers"); Peter Taylor, '*Vomiting and screaming' in destroyed waterboarding tapes*, BBC (May 9, 2012), *available at* http://www.bbc.co.uk/news/world-us-canada-17990955 (describing treatment of defendant Mohammed by CIA interrogators, which "included being deprived of sleep for over a week, standing naked, wearing only a nappy, and being waterboarded 183 times").

[17] *See, e.g.,* U.N. Human Rights Council, *Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism,* ¶ 114, U.N. Doc.A/HRC/13/42 (May 20, 2010), *available at* http://bit.ly/cziSQ (Mr. Mohamed, Mr. bin al-Shibh, and Mr. bin Attash held in the Polish village of Stare Kiejkut between 2003 and 2005.); Alex Spillius, *CIA 'Used Romania Building as Prison for Khalid Sheikh Mohammed,'* TELEGRAPH (Dec. 8, 2011), (Mr. Mohammed and Mr. bin Attash transferred "Poland to Bucharest in September 2003," and "Ramzi Binalshibh . . . w[as] also moved to Romania," noting that "[t]he prison [in Romania] was part of a network of so-called 'black sites' that included prisons in Poland, Lithuania, Thailand and Morocco operated by the CIA."); Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASHINGTON POST (Nov. 2, 2005), http://wapo.st/Ud8UD, ("Sept. 11 planner Ramzi Binalshibh was also captured in Pakistan and flown to Thailand."); Molly Moore, *Report Gives Details on CIA Prisons*, WASHINGTON POST (June 9, 2007), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/08/AR2007060800985_2.html (Mr. Mohammad was detained and interrogated at "[a] facility at Poland's Stare Kiejkuty intelligence training

(ii) Identity of Cooperating Foreign Governments. The 9-11 Commission Final Report (at 385) identifies Pakistan as playing a leading role in the capture of defendant Mohammad, and the International Committee for the Red Cross has reported that all defendants in this case were arrested by Pakistani national police/security forces.[18] Swiss officials have stated that there is enough evidence to establish that "secret detention facilities run by the CIA did exist in Europe from 2003-2005, in particular in Poland and Romania."[19] It was widely reported that videotapes of interrogations were recorded in Morocco by the Moroccan intelligence service and provided to the CIA by Moroccan officials.[20]

(iii) Identity of Personnel Involved. Some interrogators have publicly been identified,[21] and names of specific individuals can be withheld in any event

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base"); Siobhan Gorman, *CIA Interrogation Tapes of 9/11 Planner Are Found*," WALL STREET JOURNAL (Aug. 17, 2010), *available at* http://online.wsj.com/article/SB10001424052748704554104575435272683060714.html?KEYWORDS=Binalshibh+interrogation (Mr. Binalshibh was captured "in Karachi, Pakistan, on Sept. 11, 2002," and later "transferred to Afghanistan and then Morocco.").

[18] International Committee for the Red Cross, *ICRC Report on the Treatment of Fourteen "High Value Detainees" in CIA Custody*, (Feb. 2007) (ICRC Report), at 5, *available at* http://assets.nybooks.com/media/doc/2010/04/22/icrc-report.pdf.

[19] Jon Boyle, *Secret CIA jails hosted by Poland, Romania: watchdog*" REUTERS (Jun. 8, 2007), *available at* http://www.reuters.com/article/2007/06/08/us-security-renditions-idUSL0870585420070608

[20] Siobhan Gorman, *CIA Interrogation Tapes of 9/11 Planner Are Found*, WALL STREET JOURNAL (Aug. 17, 2010), *available at* http://online.wsj.com/article/SB10001424052748704554104575435272683060714.html?KEYWORDS=Binalshibh+interrogation; Associated Press, *9/11 plotter interrogation tapes found under CIA desk*, NEW YORK POST (Aug. 17, 2010), *available at* http://www.nypost.com/p/news/national/plotter_interrogation_tapes_found_ozV9gaEh0bhprlCSurWWRI#ixzz1ul4DYEnk

[21] *E.g.*, Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, THE NEW YORK TIMES (June 22, 2008), *available at* http://www.nytimes.com/2008/06/22/washington/22ksm.html?_r=1&ref=khalidshaikhmohammed (interrogator Mr. Deuce Martinez "did not engage in EIT").

without the drastic closure of all statements about defendants' treatment requested by the Government.

(iv) Interrogation Techniques, as Applied to Specific Defendants. The same official reports and press coverage of the information gathering techniques used by the CIA generally disclose much about the application of those techniques to the defendants in this case specifically. For example, the ICRC discloses:

- Defendant Mohammed gave a detailed description of the techniques used during his interrogation: "'I would be strapped to a special bed, which can be rotated into a vertical position. A cloth would be placed over my face. Water was then poured onto the cloth by one of the guards so that I could not breathe. This obviously could only be done for one or two minutes at a time. The cloth was then removed and the bed was put into a vertical position. The whole process was then repeated during about 1 hour.' As during other forms of ill-treatment he was always kept naked during the suffocation. Female interrogators were also present during this form of ill-treatment, again increasing the humiliation aspect. . . . [He also] alleged that, apart from the time when he was taken for interrogation, he was shackled in the prolonged stress standing position for one month in his third place of detention (he estimates he was interrogated for approximately eight hours each day at the start of the month gradually declining to four hours each day at the end of the month). . . . And "alleged that, in his third place of detention: 'a thick plastic collar would be placed around my neck so that it could then be held at the two ends by a guard who would use it to slam me repeatedly against the wall.'" And also alleged "that on a daily basis during the first month of interrogation in his third place of detention: 'if I was perceived not to be cooperating I would be placed against a wall and subjected to punches and slaps in the body, head and face.'"[22]

- Defendant Binalshib "alleged that he was shackled in [the prolonged stress standing] position for two to three days in Afghanistan his second place of detention and for seven days in his fourth . . ." And defendant Bin Attash alleged he was held in the same position "for two weeks with two or three short breaks where he could lie down in Afghanistan and for several days in his fourth place of detention . . . *Id.* at 11.

- Defendant Bin Attash "alleged that during interrogation in Afghanistan: 'on a daily basis during the first two weeks a collar was looped around my

[22] ICRC Report at 9-13.

neck and then used to slam me against the walls of the interrogation room. It was also placed around my neck when being taken out of my cell for interrogation and was used to lead me along the corridor. It was also used to slam me against the walls of the corridor during such movements. . . . And further alleged "that: 'every day for the first two weeks [in Afghanistan] I was subjected to slaps to the face and punches to the body during interrogation. This was done by one interrogator wearing gloves. He was then replaced by a second interrogator who was more friendly and pretended that he could save me from the first interrogator.'" He further described the following from his detention in Afghanistan: 'on a daily basis during the first two weeks I was made to lie on a plastic sheet placed on the floor which would then be lifted at the edges. Cold water was then poured onto my body with buckets. They did not have a hosepipe to fill the sheet more easily. This jail was not so well equipped for torture.' He was kept enveloped within the sheet with the cold water for several minutes. In his next place of detention, he was allegedly doused every day during the month of July 2003 with cold water from a hosepipe. He commented that: 'in this place of detention they were rather more sophisticated than in Afghanistan because they had a hosepipe with which to pour water over me.'" Defendant Bin Attash also has alleged that he was made to wear a garment that resembled a diaper. *Id.* at 11-16.

- "Defendant Binalshib alleged that he was: '*splashed with cold water from a hose*' during interrogation in his fourth place of detention and that in his eighth place of detention he was: '*restrained on a bed, unable to move, for one month, February 2005 and subjected to cold air-conditioning during that period.*'" And he further states that "he was kept permanently handcuffed and shackled throughout his first six months of detention. During the four months he was held in his third place of detention, when not kept in the prolonged stress standing position, his ankle shackles were allegedly kept attached by a one meter long chain to a pin fixed in the corner of the room where he was held."[23]

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[23] *Id.* at 16-17. *See also, e.g.,* Jess Bravin, *Guantanamo Judge Grapples With Disruptive Terror Suspects*, WALL STREET JOURNAL (May 6, 2012), *available at* http://online.wsj.com/article/SB10001424052702304752804577386102452510454.html?KEYWORDS=khalid+ (disclosing that all five defendants were held in CIA "black sites," or secret overseas prisons, where U.S. authorities inflicted brutal treatment including, in some instances, waterboarding."); Scott Shane, *Inside a 9/11 Mastermind's Interrogation*, THE NEW YORK TIMES (June 22, 2008), *available at* http://www.nytimes.com/2008/06/22/washington/22ksm.html?_r=1&ref=khalidshaikhmohammed (explaining how the CIA program worked: "A paramilitary team put on the pressure, using cold temperatures, sleeplessness, pain and fear to force a prisoner to talk. When the prisoner signaled assent, the tormenters stepped aside. After a break that could be a day or even longer, Mr. Martinez or another interrogator took up the questioning . . . whether it was a result of a fear of waterboarding, the patient trust-building mastered by Mr. Martinez or the demoralizing effects of isolation, Mr. Mohammed and some other prisoners had become quite compliant."); Jane Mayer, *The Trial: Eric Holder and the battle over Khalid Sheikh Mohammed*, THE NEW YORKER (Feb. 15, 2010), *available at*

Moreover, because the techniques themselves are publicly known, it is hard to understand how discussion of their application in a particular case could create any real risk to our national security.

(v) Conditions of Confinement. Published reports are equally detailed in discussing the conditions of defendants' confinement, noting such facts as that various defendants were kept naked for weeks, continuously shackled, had their heads shaved with some spots left in order to make them "look and feel particularly undignified and abused," were deprived of solid food for weeks, denied any possibility of exercise, and denied the Koran for long periods.[24]

This is just a sampling of the readily available public information. The Commission can, indeed *must*, take notice of the extensive amount of information that is already in the public domain – much of it as a direct result of official U.S. Government statements and publications – concerning the conditions of confinements, interrogations, and treatment of the defendants.

In light of the large amount of publicly available and officially acknowledged information, disclosure of the testimony by defendants concerning these same facts cannot realistically pose a "substantial probability" of damage to the national security. There is simply no basis for closing proceedings that address information already in the public domain. *See, e.g., In re Charlotte Observer*, 882 F.2d 850, 853-55 (4th Cir. 1989) (finding it "dubious" that harm to defendant's fair trial rights will result from re-publication of information already in the public domain; and, "[w]here closure is wholly inefficacious to prevent a perceived harm, that alone suffices to make it constitutionally impermissible."); *In re New York Times*, 828 F.2d 110, 116

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http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer#ixzz1uhvwdE6l (discussing the hundred and eighty-three sessions of waterboarding on defendant Mohammad).

[24] ICRC Report at 14-20.

(2d Cir. 1987) (holding that sealing of court papers is not proper where much of the information contained in them "has already been publicized"); *CBS v. U.S. Dist. Court*, 765 F.2d 823, 825 (9th Cir. 1985) (finding that a substantial probability of prejudice cannot exist when "most of the information the government seeks to keep confidential concerns matters that might easily be surmised from what is already in the public record").

To shield from public view the entirety of defendants' testimony would violate the public's constitutional rights and undermine the legitimacy and credibility of military commissions. "'Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.'" *United States v. Brown*, 22 C.M.R. 41, 45 (C.M.A. 1956) (quoting Wigmore, *Evidence* § 1834 (3d ed.)), *overruled, in part, on other grounds by United States v. Grunden*, 2 M.J. 116 (C.M.A. 1977); *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) ("public confidence in matters of military justice would quickly erode if courts-martial were arbitrarily closed to the public."); *United States v. Hood*, 46 M.J. 728, 731 & n.2 (A. Ct. Crim. App. 1996) ("'Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'" (quoting *Press-Enterprise I*, 464 U.S. at 508)).

7. **Oral Argument.** The Press Objectors request the Court to entertain oral argument, including allowing the Press Objectors to be heard, through counsel, before closing to the public any portion (including through the use of the "white noise" signal to redact portions of the audio feed from the courtroom) of these proceedings. *See, e.g., Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) ("representatives of the press and general public '*must* be given an *opportunity to be heard* on the question of their exclusion.'") (emphasis

added); *Phoenix Newspapers, Inc. v. U.S. Dist. Court*, 156 F.3d 940, 949 (9th Cir. 1998) ("[The court] must provide sufficient notice to the public and press to afford them the opportunity to object or offer alternatives [to closure]. If objections are made, a hearing on the objections must be held as soon as possible.").

WHEREFORE, Press Objectors respectfully ask this honorable Tribunal to deny the Government's Motion to Protect Against Disclosure of National Security Information.

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New York, New York

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